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No. 96-1293

In The

Supreme Court of the United States

October Term, 1996

LORI G. McKENZIE,

Petitioner,

vs.

RENBERG'S INC., and ROBERT L. RENBERG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LARRY D. HENRY
Counsel of Record for Respondents
ARRINGTON KIHLE GABERINO & DUNN
100 West Fifth Street, Suite 1000
Tulsa, Oklahoma 74103-4219
(918) 585-8141

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF INTERESTED PARTIES

The Petitioner is Lori G. McKenzie.

The Respondents are correctly identified in the Petition for Writ of Certiorari. The Respondents are: Renberg's, Inc. and Robert L. Renberg, President of Renberg's, Inc.

Both of the Respondents join in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an Opinion of the Court of Appeals for the Tenth Circuit reported at 94 F.3d 1478 (10th Cir. 1996). All references to the trial transcript are contained in the Appendices filed with the Tenth Circuit Court of Appeals.

STATEMENT OF JURISDICTION

Petitioner raises no justification for review by this Court as set forth in Rule 10 of the Rules of the Supreme Court. There is no conflict among the circuits, nor has Petitioner pointed to any failure of the Tenth Circuit Court of Appeals to follow existing law. Further, there is no compelling question of federal law. The decision below merely applied existing concepts of protected activity to a particular factual setting. As noted in the rules, generally a petition for writ of certiorari will not be granted for review of alleged erroneous factual findings or an asserted misapplication of a properly stated rule of law. It is within this last area that Petitioner bases her request for certiorari and the Petition should be denied on this basis alone.

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari. For the most part, Petitioner seeks creation of new legal standards and the rejection of long standing

law defining protected activity under 29 U.S.C. § 215(a)(3). Petitioner seeks special protected status for a corporate executive who has as part of his or her responsibilities the monitoring of a company's activities for compliance with a state or federal law. Petitioner attempts to gain the attention of the Court with the wording of her Question Presented. In that "question," Petitioner states that she had a good faith belief that the Respondent company was violating the Fair Labor Standards Act ("FLSA") and so informed the company's attorney. As will be pointed out below, the question misrepresents the factual scenario in this case upon which the Tenth Circuit rendered its opinion.

A. Course of Proceedings and Disposition of Case Below.

Petitioner filed her action in the United States District Court for the Northern District of Oklahoma claiming that her discharge was wrongful under 29 U.S.C. § 215(a)(3) as well as being wrongful under several state laws and a claim of wrongful discharge under ERISA. Petitioner dismissed her ERISA claim prior to trial, and the district court dismissed her supplemental state law claims. The case was tried to a jury which rendered a verdict for the Petitioner including back pay, emotional distress and punitive damages. Respondents filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, or in the alternative, a motion for new trial under Federal Rule of Civil Procedure 59. The district court granted Respondents' motion for judgment as a matter of law. The Tenth Circuit

Court of Appeals affirmed the dismissal holding that Petitioner had not engaged in any protected activity under 29 U.S.C. § 215(a)(3) because she had never engaged in any activity adverse to her employer or asserted rights under the FLSA. The Tenth Circuit also affirmed dismissal of her state law claims, but those claims are not a part of this Petition for Certiorari.

B. Correction of Misstatements in the Petition Pursuant to U.S. Supreme Court Rule 15.2.

Respondents bring the following misstatements to the Court's attention:

1. Petitioner misrepresents that she had a good faith belief that Renberg's, Inc. was violating the FLSA and reported that violation to the company's attorney and/or Robert Renberg. This assertion is set forth in the Question Presented and at pages 6, 15 and 23 of the Petition. Quite to the contrary, Petitioner testified at trial that she went to the company attorney not to report a violation, but merely to ask him for his professional opinion as to whether there was a wage and hour problem. (Trial Trans., p. 453, L. 10 - p. 454, L. 19). In fact, Petitioner testified that she was not even going to address the issue with her employer unless the attorney told her there was a problem. (Trial Trans., p. 455, L. 20 - p. 456, L. 19). Thus, while Petitioner may have reviewed company records prior to seeing the attorney, she never asserted to Respondents that they were in any way violating the law.

2. Petitioner claims at page 5 of her Petition that she discussed her concerns with Renberg's president, Robert Renberg. However, Petitioner testified at trial that she

never explained her concerns to Mr. Renberg. (Trial Trans., p. 457, LL. 2-7). In fact, she testified that all she told Mr. Renberg was that she was waiting to hear from the attorney. (Trial Trans., p. 349, LL. 6-13).

3. Petitioner claims at page 5 that she became fearful for her job. Positioning of this statement would imply that her fear related to talking to the attorney and/or Mr. Renberg. However, Petitioner testified at trial that her "fear" was that she had incorrectly monitored Renberg's pay practices, i.e., she had not properly done her job. (Trial Trans., p. 347, LL. 16-18).

4. At page 6 of the Petition, she states that she became the subject of an investigation. Petitioner fails to relate to the Court that the investigation related to complaints that Petitioner, as personnel manager, had on numerous occasions, breached the confidentiality of personnel matters and that she had disclosed information in confidential employee interviews and had become a general gossip regarding personnel matters. Petitioner also fails to note that Respondents discovered that she, as a personnel manager, had notarized a sex contract.[1] The contract provided that if the subject female sales associate received a Christmas bonus, she would give the company's male vice president "a very special and provocative intimate evening", i.e., sex. The Respondents naturally found that was outrageous conduct for a personnel manager.

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[1] The terms of that agreement are set forth in full at page 25a of the Petitioner's Appendix.

REASONS FOR DENYING THE WRIT

I.

THE FAIR LABOR STANDARDS ACT REQUIRES THAT AN EMPLOYEE ENGAGE IN ACTION IN OPPOSITION TO THE EMPLOYER.

Any anti-retaliation provisions of the various federal laws protect two basic types of activities: opposition and participation. See Clark Boardman Callaghan, *Employment Discrimination Coordinator*, ¶¶ 20,901 and 20,920. In this case, Petitioner asserts that she opposed certain practices. However, the record is clear that Petitioner did not oppose anything. Rather, she testified that she simply presented questions to the company's attorney as she was required to do by her employer. (Trial Trans. p. 455, LL. 2-10; p. 479, LL. 7-15; pp. 722-724). To constitute protected activity, the employee must actually oppose something. *Booker v. Brown and Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989). This holding is common sense since it follows the ordinary meaning of "opposition":

> Act of opposing or resisting; antagonism; state of being opposite or opposed; antithesis. Also a position confronting another or placing in contrast; that which is or furnishes an obstacle to some result . . .

Black's Law Dictionary, Sixth Edition 1990.

> 1. the action of opposing, resisting or combating; 2. antagonism or hostility; 3. a person or group of people opposing, criticizing, or protesting something, someone, or another group . . . ; 6. the act of opposing, or the state of being opposed by way of offset, comparison, or contrast . . .

Random House Dictionary of the English Language, Random House, New York 1966.

The Tenth Circuit found that Petitioner's acts were not adverse to Renberg's, i.e., they were not in opposition to any of its practices and, thus, no protected activity occurred. Petitioner and the potential amicus attempt to expand the protection of § 215(a)(3) beyond its language and beyond any decision heretofore rendered. According to these parties, every human resource employee is engaged in protected activity as an ad hoc enforcement officer with the Department of Labor or any other governmental agency that has jurisdiction for a subject which falls within that employee's job description. However, 29 U.S.C. § 215(a)(3) provides:

> (a) . . . it shall be unlawful for any person
>
> . . .
>
> (3) To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Clearly, the language of § 215(a)(3) does not support this expansive theory of protected activity. Petitioner at page 17 of her Petition partially quotes 29 C.F.R. § 24.2(b)(3). She then asks this Court to take a giant leap of faith and agree without any authority or explanation

that the regulation describes Petitioner's conduct as protected activity. Petitioner omitted the portion of the regulation that connected the cited language to "proceedings" under the FLSA. Proceedings are acts in opposition.

Petitioner's reliance upon *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S.Ct. 332, 335, 4 L.Ed.2d 323 (1960), is misplaced. In *De Mario*, employees contacted the Department of Labor regarding unpaid wages. This Court held that going to the Department of Labor was a protected activity. Clearly, Petitioner never went to or indicated a desire to go to, or threatened to go to, the Department of Labor regarding any issue prior to her discharge; nor was there any evidence in the record to suggest that Respondents believed that she would engage in such activity. The Court in *De Mario* recognized that the activity being protected by § 215(a)(3) was opposition and participation. The Court clearly noted that the conduct protected by the statute related to presenting grievances and seeking vindication of rights. These activities are clearly those in opposition to the employer. *Id.*

None of the other cases cited by the Petitioner at pages 10-11 of her Petition supports her position. Even a cursory review of those cases discloses that the plaintiff in each case did something in opposition to the employer's interest. Rather than support Petitioner's argument, they support the Tenth Circuit's analysis.

The fallacy of Petitioner's position is that it ignores the reality of what happened when she and Marsha McElroy, the company comptroller and CPA, jointly presented questions about Renberg's pay system to the company's attorney. Both employees admitted at trial that

this was what their employer expected and encouraged them to do when questions arose. (Trial Trans. pp. 93-98; pp. 455, 479; pp. 722-724). Petitioner asserts seeking guidance, as requested by her employer, is protected activity and presumes that she was protesting the practices of Renberg's. As the Tenth Circuit found, the record was devoid of any evidence that Petitioner was protesting or opposing any practice of Renberg's.

This case does not involve a situation where a human resource person becomes involved in a disagreement with his or her employer which might arguably constitute protected opposition activity. A decision for that scenario must be reserved when such a case presents itself, but that is not the situation in this case.

II.

PERSONNEL DIRECTORS ARE NOT GIVEN SPECIAL STATUS UNDER 29 U.S.C. § 215(a)(3).

At pages 12-15 of the Petition for Writ of Certiorari, Petitioner argues that the FLSA endows her with a special status. Petitioner's argument supports the rationale of the Tenth Circuit. Petitioner correctly notes at page 14 that the Petitioner could be considered an "employer" under the FLSA for purposes of liability. It goes without citation of authority, that a corporation, i.e., the employer, can only act through its employees. When Petitioner reviewed materials on wage and hour and brought them to the company attorney at the request of the company, she was carrying out the acts of the employer. The Tenth Circuit correctly noted that she was acting on behalf of

the employer and never crossed the line of acting for herself or in a way not on behalf of her employer.

III.

PETITIONER'S ANALOGY TO OTHER PROTECTIVE LAWS IS FLAWED.

At page 16 of the Petition, Petitioner asserts that her activities qualify as protected activities. At page 17 in footnote 6, she cites the case of *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986), plus other cases. Petitioner's reliance upon *Brock* and the other cases decided pursuant to 42 U.S.C. § 5851 of the Energy Reorganization Act ("ERA") is misplaced. The ERA is a distinct law wherein special provisions exist. The cases cited by the Petitioner in this section involved, for the most part, the discharge of nuclear safety inspectors.

The operation of nuclear facilities is tightly controlled and regulated by the Nuclear Regulatory Commission ("NRC"). Nuclear safety inspectors are "watchdogs" for the public safety, and to that extent, the NRC requires a quality assurance program and that the facilities be inspected, tested and subject to comprehensive systems of planned and periodic audits to be carried out to verify compliance with all aspects of the quality assurance program. 10 C.F.R. § 50 Appendix B.

The NRC's regulations attempt to provide a wide safety net for reporting problems at nuclear facilities to protect the public from nuclear disasters. To this end, the NRC issued regulations implementing broad employee

protection, e.g., 10 C.F.R. § 50.7(a).[2] The NRC regulations included as protected activity an employee providing information to the employer about safety related problems. NRC regulations do not require that an employee be in an adverse position, or even be opposed to any practice of the facility operator to be engaged in protected activity. Obviously, the risk to the public is so high that the NRC concluded that any notice must be treated as protected activity.

The cases cited by Petitioner merely uphold the NRC's regulations and have no bearing on the FLSA. Such regulations, obviously, do not apply in this case. In nuclear facilities, the employer is placed on notice by regulation that any notice of safety issues is protected activity. It is not appropriate to attempt to stretch this unique regulatory requirement to other areas of the law. This unusual regulatory structure explains why Petitioner's cases for the most part are limited to those dealing with nuclear facilities. Although Petitioner cites a few other cases, as authority, the analysis below clearly shows they do not stand for the proposition cited.

At footnote 6 on page 17 of her Petition, Petitioner cites *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In that case, which is also an NRC case, a construction worker, not a safety inspector or personnel director, disagreed with his employer over proper procedure for surveying and tagging contaminated tools. He additionally made a complaint to the

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[2] The NRC repeats this protective regulation in each subpart of its regulations beginning at 10 C.F.R. of which the above is an example.

senior health physics supervisor about the practice. *Id.* at 229-230. Even though this is an NRC case, it is a classic example of protected activity. The employee was asserting his rights and was opposing his employer's practice. Obviously, such a situation did not exist in this case.

Also at footnote 6 at page 17, Petitioner cites the case of *Pogue v. United States Department of Labor*, 940 F.2d 1287 (9th Cir. 1991). Again, this is not similar to the situation in this case, nor is the holding inconsistent with the Tenth Circuit's ruling in this case. *Pogue* also arose under the NRC's jurisdiction, the facts of the case demonstrate that the plaintiff was engaged in activities adverse to her employer. In addition to filing the routine safety reports, she filed a complaint with a shipyard commander that her supervisor was thwarting her inspection efforts. Subsequent to that complaint, several angry confrontations occurred between plaintiff and her supervisor. *Id.* at 1288. The parties did not dispute that the plaintiff engaged in protected activity. *Id.* at 1289. The case is an example of an employee engaging in activities adverse to her employer. Here, Petitioner engaged in no like activity. She never confronted her employer about any practice. She merely brought information to her company's attorney, which was her job. It was not Pogue's job to assert that her supervisor interfered with required reporting. It was not part of her job to get into angry confrontations with her supervisor.

At page 17 Petitioner cites *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993). This is a whistleblower case under the Clean Water Act. This is not a case of an employee "just doing their job." The claimant who was the chief of

laboratory and stream pollution control, became highly critical of his plant sampling procedure. The gist of his complaint was that the system used was inordinately expensive, inefficient, scientifically unreliable and in violation of the Clean Water Act user charge provisions. He made a formal written complaint to his supervisor. A year later he repeated his complaints by writing to a higher management level. Still later he wrote to the director of the organization expressing his dissatisfaction. At that time, legal counsel reviewed his complaints and found them to be without merit. This did not stop the plaintiff. He began to discard water samples because he felt they were unreliable and in the ensuing weeks he prepared a memorandum specifically alleging Clean Water Act violations that he circulated to all the plant's commissioners. At the end of his campaign against the employer's practices at all levels from his immediate supervisor to the top of the organization, the plaintiff then threatened to report his claim directly to the EPA. This is a classic whistleblowing scenario. The employee was clearly acting adverse to the company's position, claiming a specific violation and threatening to report the violation to the supervisory governmental agency. That did not occur in this case.

Respondents have never claimed that internal complaints per se cannot constitute protected activity, and the Tenth Circuit decision does not hold otherwise. Rather, in this case, Petitioner was merely engaged in her daily activities. Nothing unusual occurred. She never did anything adverse to her employer. She was merely representing the company when engaged in reviewing the company overtime practices. Respondents know of no

case that would support Petitioner's theory that her actions constituted protected activity under the FLSA or any other similar statutory scheme. The Tenth Circuit decision reflects a reasoned and common sense approach and that decision should not be disturbed.

IV.

NO SPECIAL RULES ARE NECESSARY FOR PERSONNEL DIRECTORS.

At the core of Petitioner's argument is a request that the law treat personnel directors differently than other employees. As noted above, anti-retaliation laws protect opposition and participation. Petitioner asserts that she and others like her should be protected even though they engage in neither category of protected activity. Petitioner asserts that personnel directors and the like should be afforded a new category of protected activity. This position assumes the existence of universal facts rather than examining each case on its merits. Those assumed universal facts are: All employers do not want to comply with the law and that there is a natural animosity between personnel directors and the employer; and that the focus of a personnel director's job is to protect employees rather than assisting the company in complying with legal requirements. The Court simply cannot assume that such sweeping assumptions exist that transform ordinary duties into opposition activities.

Petitioner has protection as does any employee. If she had become adverse to her employer, then those facts

would have been reviewed to determine whether opposition activity occurred. This is simply a case-by-case analysis and one that has not been rejected by the decision of the Tenth Circuit. The decision in this case does not leave personnel directors without protection, it simply does not treat the subject matter of their job as protected activity.

As the courts have recognized, a personnel director is an executive of the employer and that person is not a police officer, but rather that person is an advisor to the employer. Such an executive represents the employer, not the employee. *EEOC v. Crown Zellerbach Corporation*, 720 F.2d 1008, 1013-1014 (9th Cir. 1983); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980).

In fact, Petitioner is similarly situated to any staff person. She advised her employer on issues within the scope of her responsibility, such as a comptroller would advise about taxes, a safety director would advise on OSHA matters, and other examples come easily to mind. If this Court were to depart from the opposition requirement of protected activity, it would radically change the law of retaliation by creating a dual standard. Rank and file employees would have to show they opposed some practice while white collar executives could merely claim that some subject matter within their job responsibilities transform the performing of their job into protected activity. The law has never recognized such a two-tier system, in fact, the courts have always recognized that such executives are in a relationship of loyalty and representation of the employer. Petitioner's argument would take the Court away from this longstanding precedent.

The Tenth Circuit's decision is not unlike the decisions in *Booker v. Brown* and *Williamson Tobacco, Inc.*, 879 F.2d 1304 (6th Cir. 1989) and *Aldridge v. Tougaloo College*, 847 F. Supp. 480 (S.D. Miss. 1994), wherein these courts dismissed the plaintiffs' retaliation claims because the alleged protected activity was so vague as to not put the employer on notice that the employee was opposing the employer. Here, Petitioner had a question about overtime, and proceeded to handle that in the way her employer had instructed her to handle it, i.e., see the attorney. In fact, Petitioner admitted that this particular issue of overtime was handled like all other previous wage and hour issues. (Trial Trans., p. 67, L. 24 - p. 68, L. 17). No one expressed any displeasure with her doing her job, or tried to discourage her from pursuing her question. (Trial Trans. p. 69, LL. 10-25).

How could the Respondents be placed on notice that Petitioner was engaged in protected activity? Like the vague assertion of a claim, there is no knowledge by the Respondents that the employee was engaged in protected activity. It defies logic that Respondent would give a job duty to an employee, provide the employee with the resources to carry out that duty, then retaliate against the employee for performing that job. Beyond the illogical position of the Petitioner, she presented no evidence to suggest that Respondents did not want her to do her job.

V.

THERE IS NO PUBLIC INTEREST THAT WILL BE SERVED BY ADOPTING A NEW STANDARD.

The Tenth Circuit applied recognized standards for determining whether Petitioner had engaged in protected activity under the FLSA. Petitioner cites no authority suggesting any departure from those standards is warranted.

Petitioner seeks special treatment, i.e., a right to a jury trial any time an employee's work involves administration of state or federal requirements. Her position necessitates a jury trial any time such an employee challenges their discharge regardless of whether the employee opposed or challenged any practice of the employer. The jury will be free to second guess the termination decision. The jury will be invited to replace the judgment of management. This approach is clearly contrary to established employment law wherein the trier of fact is not allowed to substitute its judgment for that of the employer. *Walker v. AT&T Technologies, Inc.*, 995 F.2d 846 (8th Cir. 1993); *Sanchez v. Phillip Morris, Inc.*, 992 F.2d 244, 247 (10th Cir. 1993); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988); *Elliot v. Group Medical and Surgical Service*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). Petitioner is not unprotected as claimed; rather, she has the same protection as any other person.

CONCLUSION

Petitioner fails to present any conflict among the circuits, or any compelling question of federal law for this Court to consider on her Petition for Writ of Certiorari. The Tenth Circuit merely applied existing law to the facts. The decision is consistent with existing law. The writ of certiorari should be denied.

Respectfully submitted,

LARRY D. HENRY

ARRINGTON KIHLE GABERINO & DUNN
A Professional Corporation
100 West Fifth Street, Suite 1000
Tulsa, Oklahoma 74103-4219

Attorneys for Respondents
Renberg's, Inc. and
Robert L. Renberg